the negotiations of the American and British commissioners, in which he plainly shows that the Americans practically made the fishery rights an *ultimatum* and that the Englishmen so understood it. Consequently the third article of the treaty of peace of 1783 acknowledges the ancient fishery rights of the American states. This acknowledgment, according to our author, was no mere grant of a franchise, but a division or partition of empire. If this be true, it cannot be maintained that the war of 1812 abrogated *ipso facto* our fishery rights, nor was this contention of the British government ever admitted by the United States. The question was laid at rest by the treaty of 1818, upon which our fishery rights now rest; but if we now annul the treaty of 1818, our position and our rights are the same as before its conclusion. If the treaty of 1783 was not abrogated by the war of 1812, — and Mr. Jay makes a strong case for the opposite theory, — then the abrogation of the treaty of 1818 will cause the treaty of 1783 to revive in precisely the same manner as the treaty of 1818 revived after the expiration of the Reciprocity treaty of 1854 in 1866, and of the treaty of 1871 in 1885.

The pamphlet is worthy of the author, and sustains his reputation as a diplomat and a publicist.

THOMAS D. RAMBAUT.

Elements of Right and of the Law. By GEORGE H. SMITH. Second Edition. Chicago, Callaghan and Co., 1887. — 12mo, 398 pp.

The Science of Law, according to the American Theory of Government. By E. L. CAMPBELL, counsellor-at-law. Trenton, 1886. — 8vo, 113 pp.

These two works — Mr. Smith's book and Mr. Campbell's pamphlet — claim notice, less because of their value as contributions to juristic science, than because of their character and tendency. It is encouraging to find that there are lawyers in the United States who think it worth while to examine the fundamental principles of legal philosophy; and it is an interesting fact that both authors represent an energetic reaction against the theories of the dominant English school, and a reassertion of the "natural right" doctrine.

Mr. Smith divides his treatise into three parts, or books. Book i treats of the "Elements of Right"; book ii, of the "Elements of Law"; and book iii is entitled "Historical and Critical Review of the several Theories of Jurisprudence," — but is, in fact a review of certain theories only, which appear to the author of prime importance. The first and second of these divisions, as their titles imply, present the author's system of jurisprudence, or at least the outline of such a system. This portion of the book contains much good reasoning, and many keen

and true distinctions; but its value is greatly lessened by the author's adherence to an artificial and antiquated classification — none the less antiquated, from a scientific point of view, because found in recent English works. The system is one of rights, not of legal relations; and all rights are grouped into the two mediæval (not Roman) classes of rights *in rem* and rights *in personam*. This division leads to the customary absurdities. The rights which flow from family relations are classed as rights *in rem* (§ 16), — which they doubtless were in primitive society, when the head of the house *owned* wife and children, but which they are not at the present day. Of course the right to the custody of a child still expresses itself in an action which runs against third parties, and which therefore may be termed an action *in rem;* but the legal relation between father and child, like all the other family relations, is now a complex of reciprocal rights *in personam* — a fact which the author elsewhere recognizes (§ 467).

The classification adopted also results in the close association of obligations created by contract with those generated by tort (book i, chapter viii). This is Roman, but nevertheless unnatural. In a proper system of legal relations, obligations created by tort naturally fall into a separate division of the law. They belong in the field of *private* law, because private law includes all relations between individuals; but they border closely upon criminal law, which is a portion of *public* law, because the action of tort is not limited to the redress of the private injury. The individual who brings an action of tort for actual damages, brings an essentially private action; but when he sues for vindictive damages, he becomes in a peculiar sense a representative and agent of the whole community — a vindicator of the entire social order. Whether a delict shall beget a criminal action or an action for penalty, or both, is a question of social expediency pure and simple; and in the history of every system of law we therefore find crimes and torts divided by a shifting line. These facts the author entirely ignores, treating the action of tort as a suit for the recovery of actual damages only.

On the other hand, this theory of the obligation *ex delicto*, combined with an extremely peculiar construction of the obligation *ex contractu*, enables Mr. Smith to produce an apparent generic resemblance between the two. Contract, according to him, does not give the promisee any right to demand performance. The promisor is under a "duty" to perform, but there is no "obligation." Obligation is created only by some loss or "detriment" upon the part of the promisee, suffered by him in consideration of the promise. That is, "detriment" is not merely an essential element in the creation of obligation, but the very ground and cause of obligation; and it should therefore be the *measure* of obligation.

This construction obviously gives an excellent basis for the English doctrine of "consideration"; but it does not explain, on its face at least, why courts of equity enforce specific performance, or why damages, in action on breach of contract, are based on the value of the performance. According to the author's theory, there should be no action except for recovery of consideration. He bridges this difficulty by asserting that it is the *value* of the consideration which is in question, *i.e.* "its value or utility *to the obligee*," and that, "as a practical rule, it is reasonable to assume, unless the contrary clearly appears, that the value of the consideration to the obligee is as agreed upon by him" (§ 188). This seems to me both lame and inadequate; and it requires no little ingenuity on the part of the author to bring the positive rules of English law under the cover of this theory. (See §§ 190 *et seq.*) As to the "civil" law, the author boldly asserts that its doctrine is identical with his, but remains in default with the proof of this startling thesis. In point of fact, whether civil law means classical Roman law or Justinian law or modern continental European law, its principles are diametrically opposed to Mr. Smith's. It is the accepted promise, the agreement, which creates obligation at civil law; consideration, in the English sense, is not necessary; the gratuitous promise, if accepted, is, in the absence of positive statutory restrictions, actionable; specific performance is enforced when practicable; and damages for breach of contract include not only positive detriment (*damnum emergens*), but failure to gain (*lucrum cessans*). A possible explanation of Mr. Smith's error is afforded on page 124 (§ 184), where he speaks of the "cause" of contract, in the civil law, as identical with the English consideration. This, of course, is all wrong. If A agrees to give B a hundred dollars gratuitously, *i.e.* without consideration, the agreement is not *sine causa*, but *causa donandi*. "Cause" is not consideration, but motive.

Passing without further comment from the author's systematic jurisprudence to the philosophical side of his work, we find him an outspoken and energetic defender of "natural right," and a vehement renouncer of Bentham and Austin and all their works. The state does not create rights, it merely formulates and enforces them. If the state gives the individual a "power" or "liberty" which rests upon no basis of justice, there is only a "*quasi*" or "*pseudo*" right. To speak of a legal as distinguished from a moral right is simply a perversion of the word "right" from its natural meaning. (See especially book iii, chapter iv.) So far, this is a harmless bit of logomachy; but the author has the courage of his convictions, and draws an exceedingly practical inference. If an act of the legislature is contrary to right and reason, the courts, in his opinion, are bound to declare it void, — and this

although the legislature has infringed no express constitutional provision (§ 270). If this be true, certain questions commonly assigned to the domain of pure ethics are obviously legal questions of the first importance. How do we find this "right" that overrides statutes? Who declares and interprets it? In the section last cited, this function seems to be assigned to the courts; but in other passages, Mr. Smith recognizes that the courts, like the legislature, may, and sometimes do, misinterpret the "right." Its authentic and final interpretation, accordingly, must be sought elsewhere.

The author's theory on this point is most fully set forth in book i, chapter iv. The individual, he declares, intuitively knows right from wrong, and the individual intuitions agree in the main. But they do not agree in details, and "as no reason can be given why one man's conscience should be forced upon another, it follows that, in all questions between men, we must resort to the common conscience as the practical test of right and wrong" (§ 56). Here we seem to reach relatively firm ground — although we are not yet informed how this common conscience becomes legally cognizable, otherwise than in usages, constitutions and statutes, judicial decisions, *etc.*, nor how its commands are to be enforced, otherwise than through the machinery of the state. But the author does not rest here. "In view of the difference in morality of different peoples and ages, and of different classes of individuals in the same age and country, it is evident that positive morality cannot be accepted as infallible. Hence the ultimate standard of right is to be sought in reason, or scientific morality" (§ 53). But only two pages farther on, Mr. Smith plunges us into a bottomless gulf of uncertainty by admitting that "the first principles" of scientific morality are "assumed," and that "it cannot, in the present stage of its development, assert the absolute truth of its conclusions" (§ 56).

It is singular that the author does not see that his "scientific morality," "in its present stage of development," with its "assumed" first principles, is purely an individual intuition, — and that no reason can be given why one man's intuition should be forced upon another. I, for one, intuitively reject certain of his intuitions. I cannot see, for example, why the "obligation" of contract should be radically different from the "duty," and I reject this distinction of his as extremely immoral.

Mr. Campbell's *Science of Law* may be dismissed very briefly. The pamphlet is but the "preliminary chapter" of a projected work on jurisprudence; and this preliminary chapter deals almost exclusively with the philosophy of law. Mr. Campbell's legal philosophy is practically the same as Mr. Smith's. He, too, bases all law upon natural right; and with him, too, the cognition of right is intuitive. He denies

the omnipotence of the state, and is even more vehement than Mr. Smith in his denunciation of the utilitarian theory. But he is also much cruder; and one striking evidence of his crudity is contained in the title of his work. He declares his theory to be "the American theory"; and this he seeks to substantiate by quotations from the Declaration of Independence and from our national and state constitutions. But the theory is, or rather was, just as truly English in the seventeenth century and French in the eighteenth, as it was or is American. It is the revolutionary theory; and it has become imbedded in our political and legal speech because our national life began with a revolution against constituted authority.

That both these authors attack the dominant English theory as to the source of legal right, is, as I have already said, an interesting fact. As formulated by Bentham and Austin, the theory invites attack. It is true that the state makes the law; but the *state* must be sharply distinguished from the *government*, and this the dominant English jurisprudence does not always do. Nor, in truth, are the assailants of Bentham's doctrine clearly conscious of this distinction; but, as the brunt of their attack is really directed against the assumption that the *government* makes the law, and as they have little difficulty in showing the inadequacy of this theory, they compel the defenders of the dominant doctrine to reformulate their thesis and to define the word *state*. It would be better, because of the ambiguity of this word, to use the word *sovereign*. Sovereignty *may* reside in the government, or in one of its departments; but it may reside elsewhere. In our system, for example, the sovereign is not, as Mr. Smith seems to think (§ 531), the national and state governments with their various departments: it is the amending power. It would be interesting to know whether Mr. Smith desires to invest any individual or body of individuals in this country with the power to declare a constitutional amendment void, as contrary to "right."

But while it is true that the state, *i.e.*, the sovereign, creates rights, and that there are to-day no rights other than those recognized by the state, it is also true that the state ought to be the faithful interpreter of the social sense of right and equity. The emphasis which the English school places upon the first of these truths tends to obscure the second. The sense of equity is law "in the making," and it is the duty of the jurist as well as of the moralist to see that the development of law shall not lag too far behind the developing sense of equity. If books like Mr. Smith's and Mr. Campbell's operate to quicken the general recognition of this duty, they are not written in vain.

MUNROE SMITH.